MOTION FILED

NOV 10 1999

No. 99-703 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

MARLIN LEE MILLS, Captain

Petitioner,

v.

JOSEPH P. MEADOWS,
individually and in his official capacity
as Sheriff for Harford County;
and
HARFORD COUNTY, MARYLAND,
a Body Politic and Political Subdivision
of the State of Maryland

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONER FOR A WRIT OF CERTIORARI

Stephen R. McSpadden
National Association of Police
Organizations, Inc.
750 First Street, N. E., Suite 920
Washington, D.C. 20002-4241
(202) 842-4420, 842-4396 (fax)

Counsel of Record for *Amicus Curiae*

31 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONER FOR A WRIT OF CERTIORARI

The National Association of Police Organizations ("NAPO" or "Association") hereby respectfully moves this Court for leave to file a brief as an *amicus curiae*, pursuant to Rule 37.1 and 2.

Pursuant to Supreme Court Rule 37.2, on October 27, 1999, NAPO requested consent of Philip S. Roberts, Assistant County Attorney, counsel for Respondent Harford County, Maryland, and of Stuart M. Nathan, Assistant Attorney General, State of Maryland, counsel for Respondent Sheriff Meadows, to file an *amicus curiae* brief in support of the petitioner for a writ of certiorari. On November 1, 1999, Mr. Roberts advised NAPO that he was unwilling to consent to the filing of an *amicus* brief. Mr. Nathan advised NAPO's general counsel that he would take his lead from Mr. Roberts as to whether to grant consent, because Mr. Roberts has served as lead counsel for the Respondents in this matter, and therefore Mr. Nathan has withheld his consent on behalf of Sheriff Meadows.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") is a national non-profit organization, representing state and local law enforcement officers in the United States.[1] Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 250,000 sworn law enforcement officers

---

[1]NAPO's section 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, advocates the due process and workplace rights of officers.

(including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers.

Those officers and their organizations have a significant interest in the important issues of law before this Court, as some of their most basic constitutional rights, specifically those granted under the First Amendment, are at stake. Hence, it is imperative that those rights be protected, not violated, as they were in this case and in other cases throughout the Nation.

Unfortunately, there are several courts of appeal that have ruled that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, holdings which are inconsistent with this Court's decisions in *Elrod* and *Branti*.[2] Further, it is well established that when a government employer terminates an employee due to the employee's exercise of his or her First Amendment right of free speech, rather than simply based on raw political patronage alone, the reviewing court must follow the two step process set forth in this Court's *Pickering* and *Connick* decisions,[3] in determining whether the public employee's speech is constitutionally protected. Nevertheless, the U.S Court of Appeals for the Fourth Circuit has refused to follow this Court's directives in such cases, opting instead to follow the lead of the first, second, seventh, and eleventh circuit courts. Consequently, there are inconsistent holdings among, as well as within, the circuits, which undermine the principle of equal justice under law.

NAPO has member organizations with sworn law enforcement officers in the states covering four of the five

---

[2]*Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980).

[3]*Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

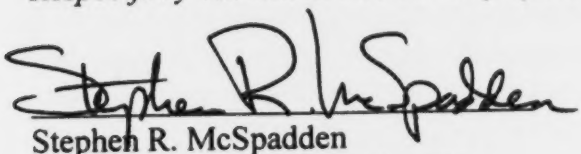
federal judicial circuits. In this day and age it is intolerable that the First Amendment rights of law enforcement officers in these states have been so severely diminished that officers can actually be fired for participating in political campaigns, or expressing their support for particular political candidates running for public office. Consequently, a deputy sheriff discriminated against on the basis of race or gender in one of the large number of states covered by these circuits would have a cause of action under the federal civil rights laws, but one disciplined for political activity would have no such remedy. Fortunately, this is not the case in all states, as these activities are plainly protected in most of the remaining federal circuits.

When NAPO has explained this lack of protection to its member organizations during legal seminars and otherwise, such explanations have met with disbelief. In response, NAPO's members have urged NAPO to support whatever opportunity arose to present this issue to this Honorable Court. *Amicus curiae* observes that the participation and contribution of organizations, such as NAPO, lies at the very heart of the First Amendment, permitting concerned citizens and their organizations to express their views and take positions on matters of public interest and the conduct of government officials, including conduct allegedly impinging on the constitutional protections of free speech and political activity. Thus, in the context of this motion, this Court should permit NAPO to express the views of thousands of law enforcement officers whose First Amendment rights have been disregarded by U.S. Courts of Appeal in those several circuits that have departed from this Court's constitutional mandates.

Therefore, *amicus curiae* National Association of Police Organizations has a significant interest in this petition and it requests that the Court grant leave for it to file the brief in support of Mr. Mills' petition for a writ of certiorari, in order to consider essential points which would support this Court's review of the lower court's appellate decision in this case. As required by Rule 37.2(b), this motion is incorporated in one

document together with the proposed brief, which immediately follows this motion.

Respectfully submitted this 10th day of November, 1999,



Stephen R. McSpadden
750 First Street, N. E., Suite 920
Washington, D.C. 20002
(202) 842-4420, fax: (202) 842-4396

Counsel of Record for *Amicus Curiae*
National Association of Police Organizations

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. It is well established that when a government employer terminates an employee due to the employee's exercise of his or her First Amendment right of free speech, rather than simply based on raw political patronage alone, the reviewing court must follow the two step process set forth in the Pickering and Connick line of cases, in determining whether the public employee's speech is constitutionally protected. Nevertheless, the U.S. Court of Appeals for the Fourth Circuit has refused to follow this Court's directives in such cases, opting instead to follow the lead of four other circuit courts. Consequently, the errant application of the law by these courts has resulted in inconsistent holdings among, as well as within, the circuits, and undermined the principle of equal justice under law. 5

II. Petitioner Mills' assertion that he was terminated due to his involvement in a competing candidate's re-election campaign, an activity involving overt speech and expression of ideas, gives rise to a First Amendment free speech claim, the appropriate analysis of which is based on the Pickering-Connick line of cases. Consequently, the appellate court's failure to evaluate Petitioner Mills' claim under the appropriate standards set forth in Pickering and Connick resulted in the complete disregard of his First Amendment rights. 7

A. The district and appellate courts should have analyzed Petitioner Mills' claim under the Pickering-Connick line of cases. 8

B. Had the Court of Appeals applied the proper analysis in considering Petitioner Mills' claim and remanded this case to the District Court, that court would have had no choice but to find that Sheriff Meadows' termination of Mills was an undeniable violation of Mills' First Amendment rights, if the alleged facts of Petitioner's claim were proven. . . 9

III. Even if the issue in this case were one of political patronage and not free speech, thus requiring evaluation under the Elrod and Branti line of cases, the inexplicable and arbitrary decisions by some courts of appeal (including the Fourth Circuit), holding that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, are inconsistent with this Court's decisions in Elrod and Branti, and have created tremendous confusion among the circuits. 11

A. Dismissals for reasons of political patronage violate the First and Fourteenth Amendments, unless the employing government official can show that the restriction is narrowly tailored to accomplish government interests. . . 11

B. Under Elrod and Branti, the position of deputy sheriff does not summarily qualify and should not therefore be automatically designated as an office for which party affiliation is an appropriate requirement for the effective performance of the officer's duties. Hence, the courts must analyze each case individually in order to determine whether political patronage is a valid requirement for the office in question. 13

C. Under Elrod and Branti, Sheriff Meadows' termination of Petitioner Mills for reasons of political patronage, if proven, violate the First and Fourteenth Amendments.. 16

VI. If a public employee is dismissed for reasons that infringe upon his constitutionally protected interests, it is immaterial whether or not the employee had a property interest in his position, hence the appellate court erred in considering

Petitioner Mills' "at will" status as a factor in its analysis. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Brady v. Fort Bend County 14
145 F.3d 691 (5th Cir. 1998)

Branti v. Finkel 3, 4, 5, 8, 10, 11, 12, 13, 14, 15, 16
445 U.S. 507, 100 S. Ct. 1287 (1980)

Buckley v. Valeo 9, 12
424 U.S. 1, 96 S. Ct. 612 (1976)

Burns v. County of Cambria, Pa. 6, 14
971 F.2d 1015 (3d Cir. 1992)

Connick v. Myers 3, 4, 5, 6, 7, 8, 9, 10, 18
461 U.S. 138, 103 S. Ct. 1684 (1983)

Cutcliffe v. Cochran 7, 14
117 F.3d 1353 (11th Cir. 1997)

Dickenson v. Quarberg 14
844 F.2d 1435 (10th Cir. 1988)

Elrod v. Burns... 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17
427 U.S. 347, 96 S. Ct. 2673 (1976)

Garrison v. Louisiana 18
379 U.S. 64, 85 S. Ct. 209 (1964)

Hall v. Tollett 14
128 F.3d 418 (6th Cir. 1997)

Hansen v. White 14
947 F.2d 1378 (9th Cir. 1991)

Harte-Hanks Comm., Inc. v. Connaughton 9
491 U.S. 657, 109 S. Ct. 2678 (1989)

Heidman v. Wirsing 7
7 F.3d 659 (7th Cir. 1993)

Jenkins v. Medford 6, 8, 9, 10, 13, 14, 17, 18
119 F.3d 1156 (1997), *cert. denied.* 522 U.S. 1090, 118 S. Ct. 881 (1998)

Jones v. Dodson 6, 14
727 F.2d 1329 (4th Cir. 1984)

Joyner v. Lancaster 6, 11
815 F.2d 20 (4th Cir. 1987)

Keyishian v. Board of Regents 5, 19
385 U.S. 589, 87 S. Ct. 675 (1967)

Kusper v. Pontikes 13
414 U.S. 51, 94 S. Ct. 303 (1973)

McBee v. Jim Hogg County, Tx. 6
730 F.2d 1009 (5th Cir. 1984) (*en banc)*

McEvoy v. Spencer 7
124 F.3d 92 (2d. Cir. 1997)

Mills v. Meadows 3
1999 U.S. App. LEXIS 16895

Morris v. Crow 7
117 F.3d 449 (11th Cir. 1997)

New York Times v. Sullivan 12
376 U.S. 254, 84 S. Ct. 710 (1964)

O'Hare Truck Service, Inc. v. City of Northlake 5, 8
518 U.S. 712, 116 S. Ct. 2353 (1996)

Ortiz-Pinero v. Rivera-Arroyo, 84 F.3d 7 (1st Cir. 1996). . . 15

Perry v. Sindermann 5, 19
408 U.S. 593, 92 S. Ct. 2694 (1972)

Pickering v. Board of Education . 3, 4, 5, 6, 7, 8, 9, 10, 11, 19
391 U.S. 563, 88 S. Ct. 1731 (1968)

Rodriguez Rodriguez v. Munoz Munoz 7
808 F.2d 138 (1st Cir. 1986)

Rogers v. Miller 7
57 F.3d 986 (11th Cir. 1995)

Rutan v. Republican Party of Illinois 8, 12, 13
497 U.S. 62, 110 S. Ct. 2729 (1990)

Shelton v. Tucker 19
364 U.S. 479, 81 S. Ct. 247 (1960)

Stough v. Gallagher 6
967 F.2d 1523 (11th Cir. 1992)

Upton v. Thompson 7, 8, 14
930 F.2d 1209 (7th Cir. 1991)

Warzon v. Drew 7
60 F.3d 1234 (7th Cir. 1995)

Williams v. Rhodes 12
393 U.S. 23, 89 S. Ct. 5 (1968)

Constitutional Provisions

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Rules

Supreme Court Rule 37 1

Other Authorities

J. Michael McGuinness, Constitutional Rights of Law Enforcement Officers in the Employment Context 72 (1996) (unpublished manuscript on file with NAPO) (presented and distributed at the 1996 National Association of Police Organizations 18th Annual Convention)... ..... 3, 15

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") respectfully submits this brief in support of the petitioner for a writ of certiorari in this case.[4]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States.[5] Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 250,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers.

Those officers and their organizations have a significant interest in the important issue now before this Court, specifically clarification of the law concerning their fundamental rights granted under the First Amendment. Hence, it is imperative that those rights be protected, not violated, as they were in this case and in other cases throughout the Nation. The *amicus curiae* asks that this Court grant review in order to provide the lower courts with clear directives on how to resolve the issues presented, so that deputy sheriffs and other public employees can engage in activities protected by those rights without constant

---

[4]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

[5]NAPO's section 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, advocates the due process and workplace rights of officers.

fear of reprisals, and can expect consistent rulings pertaining to those rights among and within the circuit courts of appeal.

In summary, NAPO respectfully requests that certiorari be granted in the instant case so that the First Amendment rights of public employees, and specifically deputy sheriffs, will be guaranteed equal protection under the law.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in Petitioner Marlin Lee Mills' petition for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

After 23 years of dedicated service with the Harford County, Maryland, Sheriff's Office under five separate sheriffs, Petitioner Marlin Lee Mills ("Mills") was terminated, on December 19, 1994, without a hearing, by newly-elected Republican Sheriff Joseph P. Meadows. Sheriff Meadows' stated basis for this termination was Mills' political association with Sheriff Meadows predecessor, Democrat Robert Comes, as well as Mills' activities as president of the Harford County Democratic Club.

Deprived of his law enforcement career, Mills sued Sheriff Meadows and Harford County, Maryland, to redress eleven specific offenses, including violation of his First Amendment rights. In response to these claims, Harford County moved to dismiss the case and Sheriff Meadows filed a Motion for Dismissal/Summary Judgment. The U.S. District Court for Maryland entered summary judgment for both defendants on April 16, 1998.

On May 14, 1998, Petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit. On July 22, 1999, the appellate court entered judgment, affirming the District Court's decision. The court held that Sheriff Meadows was entitled to terminate

Mills on the basis of Mills' political affiliation, because party affiliation is an appropriate requirement for the office of deputy sheriff in Maryland. The appellate court also cited the fact that Mills was a "high-ranking official" and an "at-will" employee in justifying its holding. *Mills v. Meadows*, 1999 U.S. App. LEXIS 16895.

Mills now respectfully petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Despite this Court's directives as set forth in the *Elrod-Branti*[6] and *Pickering-Connick*[7] lines of cases, tremendous confusion still exists among and within the U.S. judicial circuits concerning the First Amendment rights of public employees, especially deputy sheriffs. This point is emphasized by the commentary of legal expert J. Michael McGuinness:[8]

> In the law enforcement context, the courts have consistently prohibited various forms of political patronage. Among the most confusing areas involves deputy sheriffs. The law is in chaotic confusion with regard to the reemployment rights of deputy sheriffs upon election of a new sheriff. The law is also in mass confusion regarding the extent that a deputy can

---

[6] *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980).

[7] *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

[8] J. Michael McGuinness is a member of the North Carolina, Massachusetts, District of Columbia, and the U.S. Supreme Court Bars, as well as other federal and specialized courts. Mr. McGuinness has served as a professor of law at Massachusetts School of Law, and as a lecturer.

support an opponent in a sheriff's election campaign.[9]

The lower courts are split on two major issues: first, how to properly analyze free speech claims, with some courts using the *Pickering-Connick* analysis[10] while others apply the *Elrod-Branti* analysis[11]; and second, under *Branti,* how to determine whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295.

Consequently, the rights of public employees, and in particular, deputy sheriffs, differ greatly throughout the nation, depending upon the jurisdiction in which the claimants file suit. Moreover, this ambiguity in the lower courts' interpretation of the law results in the assertion of a greater number of claims than necessary, and undermines the credibility of the federal judiciary's commitment to equal justice under the law.

Accordingly, *amicus curiae* respectfully requests that this Court resolve the following issues, thus mending a division

---

[9]J. Michael McGuinness, Constitutional Rights of Law Enforcement Officers in the Employment Context 72 (1996) (unpublished manuscript on file with NAPO) (presented and distributed at the 1996 National Association of Police Organizations 18th Annual Convention).

[10]The *Pickering-Connick* analysis uses a two step process in determining whether or not a public employee's speech is constitutionally protected. The first inquiry is whether the employee spoke on a matter of "public concern." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91. If so, then the court is required to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35.

[11]The *Elrod-Branti* analysis asks "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. at 1295.

among the circuits and ensuring a consistent interpretation and application of the law throughout the nation: First, when a government employer terminates an employee due to the employee's overt speech and campaigning activities, as well as the employee's political patronage, should the reviewing court apply the two step process set forth in the *Pickering-Connick* line of cases in determining whether the public employee's speech is constitutionally protected? Second, if a deputy sheriff is terminated solely because of his political patronage, thus requiring evaluation under *Elrod* and *Branti*, may a court automatically determine that party affiliation is an appropriate requirement for the effective performance *all* deputy sheriffs, without further analysis of the facts of the case? Third, considering this Court's holdings in cases such as *Perry* and *Keyishian,* can a government employer dismiss an "at-will" employee for reasons that infringe upon the employee's constitutionally protected interests?

I. It is well established that when a government employer terminates an employee due to the employee's exercise of his or her First Amendment right of free speech, rather than simply based on raw political patronage alone, the reviewing court must follow the two step process set forth in the *Pickering* and *Connick* line of cases, in determining whether the public employee's speech is constitutionally protected. Nevertheless, the U.S Court of Appeals for the Fourth Circuit has refused to follow this Court's directives in such cases, opting instead to follow the lead of four other circuit courts. Consequently, the errant application of the law by these courts has resulted in inconsistent holdings among, as well as within, the circuits, and undermined the principle of equal justice under law.

Only a few years ago, this Court stated, in *O'Hare Truck Service, Incorporated, v. City of Northlake*, 518 U.S. 712, 719, 116 S.Ct. 2353, 2357 (1996), that when a plaintiff alleges that "a government employer takes adverse action on account of an employee or service provider's right of free speech", the court

must apply, not the analysis set forth under the *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980) line of cases, but rather, must apply the balancing test set forth in *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968) and *Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 1686 (1983). The *Elrod-Branti* line of cases asks "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 1218, 100 S.Ct. at 1295. *Pickering and Connick*, on the other hand, take a totally different approach, asking instead whether the employee spoke on a matter of "public concern", and if so, the court is required to strike a balance between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Jenkins v. Medford*, 119 F.3d 1156 (1997), cert. denied, 522 U.S. 1090, 118 S.Ct. 881 (1998) (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. At 1734-35).

Examples in which the courts of appeal have correctly applied the *Pickering-Connick* balancing test in analyzing cases with facts that are very similar to those in this case include: *Burns v. County of Cambria, Pa*, 971 F.2d 1015 (3d Cir. 1992); *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009 (5th Cir. 1984) (en banc); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992); and *Rogers v. Miller*, 57 F.3d 986 (11th Cir. 1995). In fact, the Fourth Circuit itself, contrary to its new interpretation of the law, also drew upon the *Pickering-Connick* balancing test under similar circumstances in *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), and *Jones v. Dodson*, 727 F.2d 1329, 1334 & n.6 (4th Cir. 1984) where the court explicitly stated:

> Where the protected activity involves overt 'expression of ideas' [rather than raw patronage discharges], the more open-ended inquiry prescribed by *Pickering* and its progeny are

> required to accomplish the necessary balancing. This is so even where the arguably protected activity involves 'political' speech or expression, particularly when the 'political' speech impinges directly upon employee-employer relationships.

The Fourth Circuit now chooses to blur the lines between political patronage and free speech, and in doing so joins four other circuits in its errant reliance on the reasoning set forth in *Elrod* and *Branti* when analyzing both types of claims. *See, e.g., Rodriguez Rodriguez v. Munoz Munoz,* 808 F.2d 138 (1st Cir. 1986); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); and *Cutcliffe v. Cochran,* 117 F.3d 1353 (11th Cir. 1997)[12]. As a result, such inconsistency among the circuits has left government employees exasperated when trying to comply with the law, and has undermined the credibility of the federal judiciary in these five circuits.

II. Petitioner Mills' assertion that he was terminated due to his involvement in a competing candidate's re-election campaign, an activity involving overt speech and expression of ideas, gives rise to a First Amendment free speech claim, the appropriate analysis of which is based on the *Pickering-Connick* line of cases. Consequently, the appellate court's failure to evaluate Petitioner Mills' claim under the appropriate standards set forth in *Pickering* and *Connick* resulted in the complete disregard of his First Amendment rights.

---

[12]Note that there is a sharp division within the Eleventh Circuit. In another Eleventh Circuit 1997 case, *Morris v. Crow*, 117 F.3d 449 (1997), the court properly applied *Pickering*, stating that "It is important to retain the distinction between political patronage cases and free expression cases, because the analysis applicable to the types of cases is markedly different."

A. The district and appellate courts should have analyzed Petitioner Mills' claim under the *Pickering-Connick* line of cases.

Petitioner Mills asserts that he was terminated because of his involvement in Sheriff Comes' re-election campaign. Hence, Mills' claim is undeniably based on his participation in overt speech and expression of ideas, not merely on political patronage alone, and therefore his claim must be analyzed under the *Pickering-Connick* balancing test. Remarkably, the Fourth Circuit not only refused to follow this Court's holdings in *Pickering* and *Connick* when rendering its decision, but wholly ignored them. Instead, the court opted to follow its own newly created precedent in *Jenkins v. Medford, supra*, a case in which the Fourth Circuit erroneously relied on the *Elrod-Branti* analysis when deciding the same issues as those presented in the instant case.

In *Jenkins*, the appellate court did recognize that "[w]hen public employees are subjected to discipline for the content of their speech, courts analyze these claims under the *Connick-Pickering* line of cases." 119 F.3d at 1161 n.20. Nonetheless, the majority in *Jenkins* inexplicably concluded that the "[t]he wholesale dismissal of deputies who campaigned for the losing candidate ... implicates the constitutional analysis of political patronage as developed in the *Elrod-Branti* line of cases." *Id.* at 1169 (Motz, J. dissenting). There, the Fourth Circuit disregarded the directives of this Court, as well as its own precedent, in favor of "following those courts that have improperly attempted to limit the *Elrod-Branti* holdings, relying extensively on *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), an opinion from the same circuit that was reversed in both *Rutan* and *O'Hare*, while ignoring more persuasive authority from other circuits." *Jenkins*, 119 F.3d at 1171 (Motz, J. dissenting). Consequently, "[the Jenkins] holding is directly contrary to the Supreme Court's directive in *O'Hare*, i.e., that the *Pickering-Connick* balancing test, rather than the *Elrod-Branti* analysis, is applicable to such claims." *Id.*

Despite such a clear objection, the appellate panel in the instant case followed this wayward line of reasoning, and in doing so committed a grave injustice by refusing to recognize Petitioner Mills' *Pickering-Connick* claim, thus depriving him of one of his most basic constitutional rights.

B. Had the Court of Appeals applied the proper analysis in considering Petitioner Mills' claim and remanded this case to the District Court, that court would have had no choice but to find that Sheriff Meadows' termination of Mills was an undeniable violation of Mills' First Amendment rights, if the alleged facts of Petitioner's claim were proven.

The *Pickering-Connick* analysis uses a two step process in determining whether or not a public employee's speech is constitutionally protected. The first inquiry is whether the employee spoke on a matter of "public concern." *Jenkins,* 119 F.3d 1169-1170 (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91). If so, then the trial court is required to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35).

In the case at bar, there can be little dispute that Petitioner Mills engaged in speech involving a matter of legitimate public concern, upon which "free and open debate is vital to informed decision-making by the electorate", *Pickering* 391 U.S. at 571-72, 88 S.Ct. at 1736, which includes speech regarding the qualifications of the candidates for the office of sheriff. "In fact, the Supreme Court has long recognized that the protection of speech discussing political candidates is at the core of the First Amendment." *Jenkins*, 119 F.3d at 1169-70 (Motz, J. dissenting) (citing *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 687, 109 S.Ct. 2678, 2695 (1989), *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976); and *Pickering*,

391 U.S. at 568, 88 S.Ct. at 1734-35).

Having satisfied the "public concern" part of the analysis, step two requires the court to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". *Jenkins*, 119 F.3d at 1170 (quoting *Pickering*, 391 U.S. at 568, 1734-35). In light of the alleged facts of this case, no cognizable claim that Petitioner Mills' speech interfered with the "efficiency of public services" has been set forth.

The speech in question allegedly took place away from Petitioner Mills' place of work, during off-duty hours, and prior to the election of Sheriff Meadows. It caused no disruption within the sheriff's office. Sheriff Meadows failed to produce any evidence showing that Petitioner Mills expressed any dissent or caused any disruption of any kind after Sheriff Meadows took office. Indeed, Mills told Sheriff Meadows that he was fully prepared, as a professional law enforcement officer, to serve under Sheriff Meadows with the same degree of loyalty that he had exhibited towards five previous sheriffs. Moreover, Sheriff Meadows failed to prove a compelling state interest that would outweigh Mills' First Amendment rights.

In fact, Sheriff Meadows presented absolutely no evidence to indicate that his interest in the "effective and efficient fulfillment" of his responsibilities would outweigh Mills' free speech interest. Any such claim asserted by Sheriff Meadows would have been difficult to make considering that Petitioner Mills was one of several Captains in an office of 230 people, and was not part of the "upper level command staff, which consisted of the Sheriff, his Chief Deputy, and the Bureau Commanders".

Compare Joyner v. Lancaster, 815 F.2d (4th Cir. 1987). [13]

Hence, if the Fourth Circuit had not upheld the summary dismissal of Petitioner's lawsuit, he would allegedly have been able to demonstrate that Sheriff Meadows simply did not have the right to terminate Mills for political activity, especially since that activity did not even encroach into Sheriff Meadows term of administration.

III. Even if the issue in this case were one of political patronage and not free speech, thus requiring evaluation under the *Elrod* and *Branti* line of cases, the inexplicable and arbitrary decisions by some courts of appeal (including the Fourth Circuit), holding that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, are inconsistent with this Court's decisions in *Elrod* and *Branti*, and have created tremendous confusion among the circuits.

A. Dismissals for reasons of political patronage violate the First and Fourteenth Amendments, unless the employing government official can show that the restriction is narrowly tailored to accomplish government interests.

---

[13]Joyner is a Fourth Circuit decision where the Court of Appeals analyzed a markedly similar claim under *Pickering-Connick* (rather than *Elrod-Branti*), finding that a Sheriff's interest in the effective and efficient performance of his responsibilities to the public outweighed the First Amendment Rights of a Captain in the Sheriff's department.

The justifications for the *Joyner* decision are not present in the instant case. Firstly, not only was Joyner a captain, but he was the senior of four captains, and had only two superior officers, the Sheriff himself and the Sheriff's Major, which is a far different situation than in Mills' situation. Secondly, Captain Joyner campaigned aggressively against the incumbent sheriff while the incumbent was still in office, and his activities were "causing pervasive distrust and plummeting morale." Petitioner Mills, on the other hand, campaigned for the incumbent sheriff preceding the election. He did not show any disloyalty to Sheriff Meadows after Meadows was elected, nor did he cause any friction within the office.

In *Elrod v. Burns* and *Branti v. Finkel*, this Court held that patronage dismissals violate the First and Fourteenth Amendments, and as such constitute a valid claim for relief. 427 U.S. 347, 96 S.Ct. 2673 and 445 U.S. 507, 100 S.Ct. 1287. In *Elrod* the Court stated that "[t]he First Amendment protects political association as well as political expression" because "the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." 427 U.S. at 357, 96 S.Ct. at 2681 (citing *Buckley v. Valeo*, 424 U.S. 1, 11, 96 S.Ct. 612, 632 (1976)), further stating:

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.

Id. (citations omitted). This attitude reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964)), a principle which demonstrates that "[c]ompetition in ideas and governmental politics is at the core of our electoral process..." *Id.* (quoting *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11 (1968)).

While this Court clearly condemned patronage dismissals in *Elrod* and *Branti*, it did acknowledge that First Amendment rights are not absolute, and that there are instances when the government may curtail these rights. 427 U.S. at 347, 96 S.Ct. at 2677 (citing *Buckley,* 424 U.S. at 94, 96 S.Ct. at 612). In determining whether the government's direct or indirect impairment of a public employee's First Amendment rights is justified, this Court must decide if the impairment survives strict scrutiny. *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 98, 110 S.Ct. 2729, 2749 (1990) (Scalia, J. dissenting). Thus, the encroachment "cannot be justified upon a mere showing of a legitimate state interest", *Elrod,* 427 U.S. at 362, 96 S.Ct. at

2684 (citing *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S.Ct. 303, 308(1973)), but in fact, can be justified only if the government can prove the interest is "narrowly tailored to further vital government interests." *Rutan,* 497 U.S. at 74, 110 S.Ct. at 2736. Therefore, if the government compels a public employee to support the "in-party" in order to keep his job, the requirement "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights" in order to survive constitutional challenge. *Elrod*, 427 U.S. at 363, 96 S.Ct. at 2685. Consequently, *Elrod* limited the validity of political patronage dismissals to positions involving policymaking and/or confidential information. 427 U.S. at 367, 96 S.Ct. at 2687.

Subsequently, this Court revisited the issue four years later in *Branti.* There, it significantly revised the *Elrod* formulation and narrowed public employers' ability to discharge employees for political reasons, by asking, instead, "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295. What this exactly means, however, is the source of much controversy among the circuit courts of appeal, resulting in a flurry of inconsistent holdings. *Rutan,* 497 U.S. 62, 111, 110 S.Ct. 2729, 2756 (Scalia, J. dissenting).

B. Under *Elrod* and *Branti*, the position of deputy sheriff does not summarily qualify and should not therefore be automatically designated as an office for which party affiliation is an appropriate requirement for the effective performance of the officer's duties. Hence, the courts must analyze each case individually in order to determine whether political patronage is a valid requirement for the office in question.

In *Jenkins*, the Fourth Circuit ignored the directives set forth by this Court in *Branti*, and instead chose to apply the *Elrod*

standard when reviewing the case. In so doing, the court decided that the office of deputy sheriff is always a policymaking position despite the court's own previous rulings. *See, e.g., Jones v. Dodson,* 727 F.2d 1329 (4th Cir. 1984)[14] . Such a holding is also contrary to other circuits, which have held that the political affiliation of a deputy sheriff is not essential to the discharge of the deputy's duties. *See, e.g., Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015 (3d Cir. 1992) *cert. denied,* 506 U.S. 1081 (1993); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997); *Hansen v. White*, 947 F.2d 1378, 1380 (9th Cir. 1991); and *Dickenson v. Quarberg*, 844 F.2d 1435 (10th Cir 1988).

In so doing, the Fourth Circuit, in this case and in *Jenkins,* has ignored the decisions of this Court, as well as those of other circuits, which have limited such dismissals by actually examining "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved", in favor of "following those courts that have improperly attempted to limit the *Elrod-Branti* holding...", *Jenkins,* 119 F.3d at 1156, 1171 (Motz, J. dissenting), in cases such as *Upton v. Thompson,* 930 F.2d 1209 (7th Cir. 1991) and *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997).[15]

Under either *Branti* or *Elrod*, the office of deputy sheriff does not automatically fall within the classification of positions

---

[14]Wherein the court stated "[W]e do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of the power involved, or the customary intimacy of the association of the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to partisan political interests and involve access to confidential information bearing ... on partisan political concerns."

[15]These cases held that a sheriff's termination of deputy sheriff on the basis of loyalty and support for the former sheriff does not violate the First Amendment.

that require political patronage. As was the case with *Branti*, where this Court rejected political patronage requirements placed upon public defenders, sheriff's deputies usually have broad responsibilities with respect to particular duties assigned to them, but have little, if any, responsibility with respect to the overall operation of the office in which they are employed. 445 U.S. at 511, 100 S.Ct. at 1291. In fact, "[a] significant body of circuit court precedent suggests that *Branti's* definition of the range of jobs legitimately subject to patronage removal is 'extremely narrow.'"[16] For example, as J. Michael McGuinness has observed:

> The First Circuit has developed a substantial body of jurisprudence in these cases. In *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), the court summarized the doctrine within the First Circuit. In determining whether a government position is "political" [the First Circuit] does not depend upon loose fitting labels such as "confidential" or "policymaking," but rather on the substance of the duties inherent in the position itself. First, [does] the overall function of the employee's department involve "decision making on issues where there is room for political disagreement on goals or their implementation." Second, [do] the particular responsibilities of the plaintiff's position resemble those of a "policymaker, privy to confidential information, a communicator, or some other office holder whose function is an equally appropriate requirement" for continued employment. Factors relevant to the second element include the relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected

---

[16]McGuinness, *supra* note 9, at 74 (citing *Jones v. Dodson*, 727 F.2d at 1335 note 6 and *McDonald v. Adams*, 829 F.2d 1319 (4th Cir. 1987)).

officials, and responsiveness to partisan politics and political leaders. Determining whether a position is political for purposes of the *Branti* analysis is a question of law for the court.[17]

C. Under *Elrod and Branti*, Sheriff Meadows' termination of Petitioner Mills for reasons of political patronage, if proven, violate the First and Fourteenth Amendments.

The required *Elrod-Branti* analyses are especially applicable in the instant case, as the facts in both *Elrod* and the instant case are strikingly similar. Both cases involve the dismissal of deputy sheriffs, who were not protected by law from arbitrary discharge for reasons of political patronage. John Burns, respondent in *Elrod v. Burns,* was employed by Cook County, Illinois, Sheriff's Office as Chief Deputy of the Process Division.[18] This position required Burns to supervise employees and departments within the Sheriff's Office. Nevertheless, this Court found:

> It was clear that the duties of the employees--the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County--were not of that character, for they were, as Mr. Justice Stewart stated "nonpolicymaking, nonconfidential government employees".

Branti, 445 U.S. at 517, 100 S.Ct. at 1294 (quoting *Elrod*, 427 U.S. at 375, 96 S.Ct. at 2690).

In comparison, the Petitioner in the case at hand, Marlin

---

[17] *Id.* at 74-75.

[18] John Burns was the named plaintiff in a class action suit which involved other claimants.

Mills, served the Harford County Sheriff's Office with distinction for 23 years, under five separate sheriffs, rising to the rank of captain. As a captain, however, Mills was not part of the Respondent sheriff's upper level command staff, which consisted of the sheriff, his chief deputy, and the bureau commanders. Petitioner Mills, as a captain, was below this level, along with numerous other captains, lieutenants, sergeants, corporals, and deputies comprising an office of approximately 230 people. Within that hierarchy, Mills was required to follow the directives and policies established by his sheriff and superiors. In fact, political affiliation and activities played *no* part of Mills job responsibilities. And while Petitioner Mills did support the incumbent sheriff, a fellow Democrat, when he ran for re-election, he never conducted any type of political activity during business hours or otherwise while on the job, before or after Sheriff Meadows was elected. Further, Mills was fully prepared to serve Sheriff Meadows loyally, as he had five other sheriffs, and informed Sheriff Meadows of those intentions.

More importantly, however, is the fact that Sheriff Meadows provided no evidence to support a claim that "party affiliation is an appropriate requirement for the effective performance" of Petitioner Mills job, nor did Sheriff Meadows establish an overriding interest of vital importance that would require Mills' personal beliefs to conform to those of the Sheriff, as required by *Branti*. In fact, in Sheriff Meadows' affidavit he admitted that party "affiliation had absolutely nothing to do with who I appointed" even in the case of upper level command positions.

Nevertheless, the District Court and the Court of Appeals inexplicably found that political affiliation was an appropriate requirement not only for Petitioner Mills, but for all Maryland deputy sheriffs, stating: "[*Jenkins*] noted that sheriffs ... are 'important political figure[s]' who are responsible for implementing a political agenda that has been approved by the voters through the sheriff's election" and that "a deputy sheriff is the alter ego of the sheriff...", thus finding that party affiliation

is an appropriate requirement for the office of deputy sheriff because "sheriffs, as elected officers, require loyal deputies to help them implement their policies-- 'policies presumably sanctioned by the electorate'", *Mills,* 1999 U.S. App. LEXIS 16895 (quoting *Jenkins*, 119 F.3d at 1163), a proposition that was undeniably refuted in *Elrod.*

IV. If a public employee is dismissed for reasons that infringe upon the employee's constitutionally protected interests, it is immaterial whether or not the employee had a property interest in his position, hence the appellate court erred in considering Petitioner Mills' "at will" status as a factor in its analysis.

Until the 1950s and early 1960s, a public employee had no right to object to conditions placed upon the terms of employment, even if those conditions infringed upon the employee's constitutional rights. *Connick*, 461 U.S. at 144, 103 S.Ct. at 1688. Since then, however, this Court has rejected that theory. It has invalidated statutes and actions that have limited the rights of public employees to participate in public affairs, stating that "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216 (1964)). In fact, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values, and is entitled to special protection. *Id.* (citations omitted). As such, the government cannot legitimately prevent or chill government employees from joining political parties and other associations, nor can it infringe upon the employees' freedom of speech concerning matters of public concern. *Connick*, 461 U.S. at 1454-55, 103 S.Ct. at 1689.

These holdings afford public employees First Amendment protections regardless of whether the employees have a property interest in their employment or can be dismissed "at will." In *Elrod*, this Court reiterated the principle first set forth in

Keyishian, where this Court rejected "[t]he theory that public employment which may be denied altogether, may be subjected to any conditions, regardless of how unreasonable...", *Elrod* at 427 U.S. at 361, 96 S.Ct. 2683(quoting *Keyishian v. Board of Regents*, 385 U.S. at 589, 605-606, 87 S.Ct. 675, 685 (1967)), and it stated:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Id. (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972)). For instance, it may not deny employment to a person on a "basis that infringes his constitutionally protected interests — especially his interest in freedom of speech." *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697-98 (1972). Subsequently, this core principle has been repeatedly applied to public employment, providing protection to employees regardless of their contractual or other claim to a job. *Id.* (comparing *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968) with *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960).[19] Hence, the lower court's reliance on Petitioner Mills' status as an "at will" employee as a factor in its analysis is errant and in clear contradiction to Supreme Court precedent.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* National Association of Police Organizations urges this Court to accept review of this case in order to clarify the law regarding the issues of free speech and political patronage presented by this case and to resolve the inconsistent application of the law

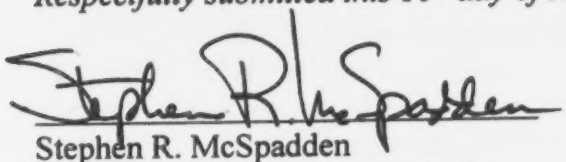
---

[19]The same principle applies to certain statutory provisions as well. For example, under Title VII, Civil Rights Act of 1994, an "at-will" employee cannot be discharged on the basis of race or gender.

throughout the country. These are significant constitutional issues which have not been resolved and are therefore the source of an ever-widening split among the circuit courts. Guidance from this Court would clarify the First Amendment rights of government employees, especially law enforcement officers who are ready on short notice to place their life in harm's way to protect others.

Therefore, *amicus curiae* respectfully requests that this Honorable Court grant the instant petition for writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted this 10th day of November, 1999,



Stephen R. McSpadden
750 First Street, N. E., Suite 920
Washington, D.C. 20002
(202) 842-4420, fax: (202) 842-4396

Counsel of Record for *Amicus Curiae*
National Association of Police Organizations